No. 86-1192

Supreme Court, U.S.
FILED
MAR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

JAMES W. KERR, JR., PETITIONER

V.

EL PASO TIMES, INC., RESPONDENT

ON PETITION FOR A WRIT CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

PETITIONER'S REPLY MEMORANDUM

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Respondent, in its opposing brief in No. 86-1192, raises two new questions which were not addressed in Petitioner's Petition for a Writ of Certiorari. Respondent has urged this court to

consider whether or not the newspaper article was published with actual malice and whether Texas law required judgment for Respondent. (Brief In Opposition, p.12-20).

Petitioner presents this Reply Memorandum to respond to the two new arguments. Neither argument is properly brought before this court. The Court of Appeals for the Eighth District of Texas did not consider the sufficiency of the evidence on the issue of actual malice. Even so, the trial court record is filled with clear and convincing evidence of Respondent's actual malice in support of the jury's finding of such. Furthermore, this court does not have jurisdiction to consider whether Texas law was properly applied by a Texas court.

I.

The Clear And Convincing Evidence At Trial Established That The "Cheating"

Accusation Was Made With Actual Malice.

Preliminary, the question regarding sufficient evidence of actual malice is not properly before this court because it was not the basis of the holding in the Court of Appeals for the Eighth District of Texas. See El Paso Times, Inc., v. Kerr, 706 S.W. 2d 797, 798(Tex.App. - El Paso 1986, writ ref'd n.r.e.) (appellant's points of error regarding whether the article was a constitutionally protected expression of opinion were "determinative of this appeal"). The Court of Appeals based its decision only on the constitutional distinction between a statement of fact and a statement of opinion. Thus, Respondent's newly raised question as to actual malice is improper for consideration by this court.

Petitioner recognizes that in order for the article to be actionable, the Respondent must have acted with actual

malice in making the cheating accusation, such that the accusation was made with knowledge of its falsity or was made in reckless disregard of its truth or falsity. New York Times Co., v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Many pieces of evidence of actual malice, however, were presented to the jury at the trial court level which cumulatively joined together to meet the clear and convincing burden of proof.

Other courts have recognized that cumulative evidence can be clear and convincing proof of actual malice. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 157-59, 87 S.Ct. 1975, 1992-93, 18 L.Ed. 2d 1094, rehearing denied, 389 U.S. 889 (1967) (finding of actual malice affirmed where evidence showed story was not "hot news", story should have been investigated but was not, and independent support for story was not gained);

Goldwater v. Ginzburg, 414 F. 2d 324, 339-40, cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed. 2d 695, rehearing denied, 397 U.S. 978 (1970) (2d cir. 1979) (jury finding of actual malice affirmed where evidence showed story was not "hot news", defendants were aware of possible harm, and only sketchy investigation was done). A brief summary of some of the evidence presented to the jury in the current case shows that the jury's finding of actual malice was supported by clear and convincing evidence.

For example, Ron Dusek the newspaper reporter for the article in question, testifed that he intended the readers to believe that Petitioner (Kerr) had conducted himself unethically during the trial, but that he had no evidence that Kerr had cheated with regard to the handling of the code name list in the de la Torre trial. (S.F. 68, 118-120). The

Appellate Court which heard this case also recognized that "[a]s far as the record before us in concerned, there is no evidence that Kerr either lied or cheated." El Paso Times, Inc., v. Kerr, 706 S.W. 2d at 799. Petitioner urges this court to consider that the jury heard Dusek's testimony and had the opportunity to watch his mannerisms. Proof that Dusek accused Kerr of cheating when Dusek knew it was false depended to some extent "on the credibility of the witness[], which can best be determined by the trier of facts after observation of the demeanor of the witness[] during direct and cross examination." Morrison v. Nissan Motor Co., 601 F. 2d 139, 141 (4th cir. 1979). Respondent told this court that Dusek believed everything he printed was true. (Brief in Opposition, p.12-16). However, this Honorable Court has recognized that:

"[t]he defendant in a defamation

action ... cannot ... automatically insure a favorable verdict by testifing that he published with the belief that the statements were true. The finder of fact must determine whether the publication was indeed may in good faith." St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968).

The evidence also established that **El Paso Times, Inc.,** published the article with reckless disregard for its truth. It was established for the jury that there were no time constraints to publish this article, since it was not a "hot news" item. The jury could fairly consider the absence of time pressure when deciding on the presence of actual malice. See Carson v. Allied News Co., 529 F. 2d 206, 211 (7th cir. 1976); Vandenburg v. Newsweek, Inc., 507 F. 2d 1024, 1026 (5th cir. 1975) ("when the

story is not hot news ... the investigation must be more thorough").

Ed Foster, a former editor for the **El Paso Times** , denied having edited the article even though Dusek testified that the article was placed on Foster's desk for his review. (S.F. 316). Foster testified that he was unaware of anyone inquiring into the accuracy of the article, although the charges in the article were so startling and obviously damaging that he would have initiated a serious inquiry before publication. (S.F. 316, 325).

In addition, the article as a whole evidences that it was a hatchet job on the law enforcement agencies discussed, which is a factor to be considered when determining if the publication was a knowing and reckless falsehood. See e.g. Curtis Publishing Co. v. Butts, 388 U.S. at 169 (defendant had adopted a program of

"sophisicated muckraking designed to provoke people, and make them mad"); Goldwater v. Ginzberg, 414 F. 2d at 342 (evidence of ... motive and intent may help establish actual malice); Cochran v. Indianapolis Newspapers, Inc., 372 N.E. 2d 1211, 1220 (Ind. 1978) (desire to get plaintiff is relevant and is admissible as evidence in determining whether defendant possessed a state of mind highly condusive to reckless disregard of falsity). The Supreme Court of West Virginia agreed with such analysis when it stated:

> "[p]ersonal motives on the part of a newspaper, or participation of a newspaper in a plan or scheme to injure is evidence of recklessness and willful disregard for truth which may be considered along with other evidence on the question of actual malice." Sprouse v. Clay Communications, Inc., 211 S.E. 2d

674, 688 (W. Va. 1975), cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed. 2d 107, rehearing denied, 423 U.S. 991 (1975).

This is only a partial list of the evidence which was presented to the jury at the trial court level on the issue of actual malice. When each of these pieces are added together, Petitioner clearly met his burden of showing by clear and convincing evidence that Respondent published the cheating accusation knowing that it was false or in reckless disregard of its truth or falsity. Thus, no constitutional protections are available.

II.

The Supreme Court Does Not Have Jurisdiction To Rule On Texas Law In This Petition For Writ of Certiorari.

The jurisdiction of the Supreme Court to review a judgment by the highest court of a state by writ of certiorari is

defined in 28 U.S.C.A. §1257 (3) (West 1984). The statute clearly states that the Supreme Court's jurisdiction is limited to questions regarding the "the validity of a treaty or statute of the United States ... or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution". 28 U.S.C.A. §1257 (3) (West 1984).

Respondent's request for the court to consider Texas law on the Petition for Writ of Certiorari is inappropriate. This court has recognized that it does not have the jurisdiction to evaluate a state court's interpretation of state law. See International Longshoremen's Assoc., A.F.L. - C.I.O. v. Davis, __ U.S. __, 106 S.Ct. 1904, 1910, 90 L.Ed. 2d 389 (1986) (Supreme Court has "no authority to review state determinations of purely state law"); Chandler v. Florida, 449 U.S. 560,

569, 101 S.Ct. 802, 807, 66 L.Ed. 2d 740 (1981) ("in reviewing a state-court judgment, [the Supreme Court is] confined to evaluating it in relation to the Federal Constitution").

Regardless of the foregoing, Petitioner asserts that Texas law does not require judgment for Respondent. Petitioner would refer this court to the Brief for Appellee which Petitioner filed in the Court of Appeals for the Eighth District of Texas. The argument and authorities under Appellee's Reply Point No. 3 clearly state that there was factually sufficient evidence of compensable mental anguish and injury to Kerr's reputation. (Brief for Appellee, p.35-48).

The only proper federal question before this court is whether a newspaper article statement which falsely and maliciously accused Petitioner, James

W. Kerr, Jr., of cheating in the prosection of a drug smuggling case was an actionable statement of fact or was a protected expression of opinion. Neither of the new matters which Respondent raised in his Reply Brief were the basis of the decision made by the Court of Appeals for the Eighth District of Texas. They are inappropriate for consideration by this court. The trial court record establishes actual malice by clear and convincing evidence anyway. Furthermore, Respondent's argument regarding Texas law is clearly beyond the jurisdiction of the Supreme Court.

CONCLUSION

For the reasons set forth above, as well as those which have been urged in the Petition, Petitioner respectfully prays that this Petition for Writ of Certiorari should be granted to review the Judgment and Opinion of the Court of Appeals for

the Eighth District of Texas.

Respectfully submitted,

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